88-169

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

SAMUEL LORING MORISON,
Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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July 28, 1988

QUESTIONS PRESENTED

1. Did Congress intend the espionage statute, 18 U.S.C. § 793(d) and (e), and the theft of government property statute, 18 U.S.C. § 641, to apply to a federal government employee who (a) sent copies of three classified photographs to a news magazine, and (b) in connection with providing additional information to the magazine, retained in his home copies of classified intelligence reports?

2. If Congress did intend these statutes to apply to petitioner's conduct, are they, as construed by the courts below, unconstitutionally vague or overbroad?

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Samuel Loring Morison petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-60a) is reported at 844 F.2d 1057. The district court's opinion denying petitioner's motion to dismiss the indictment (App. 61a-77a) is reported at 604 F. Supp. 655.

JURISDICTION

The judgment of the court of appeals (App. 78a) was entered on April 1, 1988. A timely petition for rehearing was denied on April 29, 1988 (App. 79a). On June 16,

1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The theft of government property statute, 18 U.S.C. § 641, provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

The pertinent subsections of the Espionage Act of 1917, as amended by the Internal Security Act of 1950, 18 U.S.C. § 793(d) and (e), provide:

> (d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to

the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

* * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Samuel Loring Morison is the first person to be convicted under the Espionage Act of 1917, 18 U.S.C. § 793 (d) and (e), and the theft of government property statute, 18 U.S.C. § 641, for disclosing classified documents or information to the press. Indeed, this is only the second prosecution under these statutes for disclosures to the press, the first being the ill-fated indictment

of Daniel Ellsberg and Anthony Russo for their roles in disclosing the Pentagon Papers to the *New York Times*.[1] Every other case in which these statutes have been applied to disclosures of classified information has involved classic espionage—the covert transmission of information to foreign agents. This case therefore presents the important question of whether Congress intended these statutes to apply to disclosures to the press and, if so, whether these statutes, as applied to such conduct and as construed by the courts below, are unconstitutionally vague or overbroad.

A. *The Charges*

Until his arrest on October 1, 1984, Morison was employed at the Naval Intelligence Support Center (NISC) in Suitland, Maryland as an analyst of Soviet amphibious ships. For approximately eight years prior to his arrest, Morison had also held, with the Navy's knowledge and consent, a part-time job as the American editor of *Jane's Fighting Ships*, an annual review of the world's navies that is published by a British concern, Jane's Publishing Company.

In mid-1983, Jane's began publishing a magazine entitled *Jane's Defence Weekly*, and Morison began performing various services for the *Weekly* on a voluntary, unpaid basis. During the spring of 1984, he provided an unclassified sketch of a Soviet ship, edited an article written by a member of the magazine's staff, provided corrections on material the magazine had published, wrote a three-page background piece on an explosion that had occurred in the weapons depot of a Soviet naval base at Severomorsk on the North Sea, and subsequently sup-

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[1] *United States* v. *Russo*, No. 9373-(WMB)-CD, *dismissed* (C.D. Cal., May 11, 1973). The case was dismissed when it was revealed that the government failed to disclose that Ellsberg had been overheard on a warrantless wiretap and that government agents had burglarized the office of his psychiatrist.

plemented the information in this piece by telephone. (Court of Appeals Appendix 743-757) (hereafter "C.A. App. ——"). The explosion was the subject of much reporting in other media, and *Jane's Defence Weekly* included the material Morison provided along with information obtained from other sources in a published article. In late July 1984, the *Jane's* editors, at their own initiative and without any prompting from Morison, decided to send him a $300 gratuity for his past contributions to the magazine. (C.A. App. 715-16, 756-59, 782-83, 803.)

Prior to either receiving the $300 or learning that he would receive it, Morison committed the acts that led to his arrest. At some point during the last week of July 1984, he mailed to *Jane's Defence Weekly* three classified photographs of a Soviet aircraft carrier under construction at the Nikolayev Shipyard on the Black Sea. The pictures had been taken by a KH-11 reconnaissance satellite earlier in the month, and Morison sent to Jane's prints that had been made from the original photographs and were available to him at NISC. Jane's published the pictures in the August 11, 1984 edition of *Jane's Defence Weekly*, and they were reproduced in print and television media throughout this country and around the world. Morison neither requested nor received any compensation for providing these photographs to Jane's. (C.A. App. 822-23.)

The Soviet aircraft carrier was of significant news interest for two reasons. First, it was the Soviet Union's first nuclear powered carrier. Second, it was the first Soviet carrier large enough to accommodate conventional aircraft. All previous Soviet carriers had been limited to vertical take-off and landing aircraft, which are much more limited in their range of operations than conventional aircraft. Consequently, the new nuclear carrier represented a quantum leap in Soviet sea power. (C.A.

App. 810-20, 1044-45, 1069.) When arrested, Morison, after initially denying that he had sent the photos to Jane's, admitted that he had done so in order "to let people know what the other side was doing." (C.A. App. 525-26.)

The government decided to make a test case out of Morison's disclosures. His conduct obviously did not fit the mold of classic espionage: Morison gave the photographs to a magazine for publication, not to a foreign agent, and he neither sought nor received payment for the pictures. At most, the evidence suggested that Morison aspired to permanent employment with *Jane's Defence Weekly*. Nonetheless, the government indicted him under the subsection of the espionage laws that makes it a crime for a person having lawful possession of documents "relating to the national defense" to deliver them to a person not entitled to receive them. 18 U.S.C. § 793(d). This statute carries a penalty of up to ten years imprisonment and a fine not to exceed $10,000. Not satisfied with charging Morison with espionage for leaking information to the press, the government also charged him under 18 U.S.C. § 641 with stealing the three photographs, which the government alleged had a value in excess of $100, thereby making the crime a felony and subjecting Morison to ten years in prison and a fine of up to $10,000.

Following Morison's arrest for disclosure of the photographs, his apartment was searched pursuant to a warrant. During that search, government agents found xerox copies of excerpts of classified intelligence reports concerning the explosion at Severomorsk. The reports, called Weekly Wires, are summaries of intelligence information prepared by NISC and distributed to the United States intelligence community. Although Morison had transmitted some of the information in the Weekly Wire excerpts to *Jane's Defence Weekly*, the government did not charge him with unlawful disclosure of that in-

formation. Instead, he was charged with unlawfully retaining a government document "relating to the national defense" and failing to return it to a proper government official. This charge was brought under a different subsection of the espionage laws, 18 U.S.C. § 793(e), which applies to persons who have unauthorized possession of national defense documents, whereas subsection (d), which formed the basis of the charge on the photographs, applies to those who have lawful possession of such documents. In all other respects, including the applicable penalties, subsections 793(d) and (e) are identical, covering both unlawful transmission and unlawful retention of documents relating to the national defense. The government also indicted Morison, under 18 U.S.C. § 641, for theft of government property having a value over $100 for making copies of the Weekly Wire excerpts and taking them home.

B. *Morison's Contentions*

Morison made two principal sets of arguments in the courts below: first, the espionage and theft statutes do not apply to his conduct; and second, if they do, they are unconstitutionally vague and overbroad as applied to that conduct. Both in his motion to dismiss the indictment and on appeal, Morison did not question Congress' constitutional authority to criminalize the disclosure of sensitive defense information to the press. Instead, Morison contended that courts should not apply criminal statutes to conduct that enables the press to inform the public unless it is clear that Congress intended the statutes to have that reach.

Morison maintained that the legislative history of subsections 793(d) and (e) shows that Congress intended these statutes to be limited to acts of espionage, and that there is no evidence that Congress intended section 641 to apply to disclosure of government information in general or classified information in particular. Further-

more, Congress has repeatedly refused to enact a general anti-leak statute, despite repeated requests from the executive branch for such a statute and the widely held view among officials responsible for protecting the national security that current law does not reach disclosures to the press. In light of all these factors, Morison argued that the courts should not usurp Congress' role and "interpret" subsections 793(d) and (e) and section 641 to make such conduct a crime. Morison further argued that since section 641 prohibits the theft of "things," the government cannot properly rely on the value of the intangible information in a document to establish the document's value.

Morison also argued in the courts below that even if subsections 793(d) and (e) and section 641 were intended to apply to disclosures to the press, the statutes are unconstitutionally vague and overbroad as applied to such conduct. On its face, the term "relating to the national defense" in subsections 793(d) and (e) is vague because it is incapable of any precise meaning and therefore fails to give meaningful warning as to what documents fall within its scope. The term is overbroad because it proscribes disclosure of documents relating to the national defense that are harmless and protected by the First Amendment as well as those that might lawfully be regulated because of a compelling interest in secrecy. Section 641, as applied to government documents, contains no limitations at all and therefore makes it a crime for anyone "without authority" to disclose any government document.

C. *District Court Proceedings*

The district court denied Morison's motion to dismiss the indictment. (App. 61a-77a.) The court agreed that Morison had cited "an impressive wealth of legislative history suggesting that § 793 was only meant to apply in the classic espionage setting." (App. 66a.) However, the

court concluded that it is "impossible to determine exactly what Congress meant when it passed the [espionage] statute, [but] it is more likely that the type of activity that defendant allegedly engaged in was meant to be covered." (*Id.*) The court also ruled that there is no obstacle to applying section 641 to government information. (App. 75a)

In response to Morison's vagueness and overbreadth attacks on the term "relating to the national defense" in subsections 793(d) and (e), the government urged the district court to use a narrowing construction that had been approved by the Fourth Circuit in a prior case involving genuine espionage. *United States* v. *Dedeyan*, 584 F.2d 36 (4th Cir. 1978). Under this construction, in order to prove that a document relates to the national defense, the government must establish that (1) the information is closely held by the government, and (2) unauthorized disclosure would be potentially damaging to the United States or useful to an enemy of the United States. Over Morison's objection that "potential damage" was also vague and overbroad, the judge used this construction of "relating to the national defense" in instructing the jury.

There was no dispute at trial that Morison disclosed the photographs to Jane's or that he had retained copies of the Weekly Wires excerpts at his home. The principal issues for the jury were whether disclosure was potentially damaging to the United States or useful to an enemy and whether the information in the photographs and Weekly Wires was worth more than $100. The government contended that the photographs met these criteria because they reveal the capabilities of the KH-11 satellite as of July 1984, and that the Weekly Wires met the criteria because, if they were disclosed, they would reveal the capabilities of United States intelligence agencies to assess the extent of the damage from the explosion at Severomorsk. There was no testimony that the

photographs and Weekly Wires had any value apart from the information they revealed.

The defense contested these assertions with respect to the photographs by eliciting admissions from the government that (1) in 1978 a CIA employee had sold to the Russians a copy of the manual for the KH-11 satellite that fully described its capabilities, and (2) prior unauthorized publications of KH-11 photographs revealed as much about the capabilities of the satellite as the Jane's photographs.[2] In light of these prior disclosures, a retired CIA official, who had been the senior United States government official responsible for coordinating the KH-11 program, testified in Morison's behalf that the potential damage from disclosure of the Jane's photographs was "zero." (C.A. App. 922-28, 951-52.) However, the government insisted that disclosure of the photographs met the minimal test of being "potentially" useful to our enemies because they confirmed that in July 1984 the KH-11 was still operating in the same manner as described by the manual and disclosed in the previously compromised photographs.

The defense attempted to demonstrate that the information in the Weekly Wires concerning the Severomorsk explosion was not closely held by introducing a large collection of news reports on the explosion that were attributed to government sources. A British journalist also testified that he had been told of details of the Severomorsk explosion by a European NATO official stationed in Washington. In addition, a former CIA Soviet analyst

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[2] In December 1981 a magazine entitled *Aviation Week and Space Technology* published a picture of a Soviet airfield and bomber that had been produced by a KH-11 satellite. (C.A. App. 449.) Furthermore, a number of KH-11 pictures had been lost in the Iranian desert in April 1980 when the attempt to rescue the hostages at the United States Embassy in Teheran was aborted. The Iranians recovered the abandoned pictures and published them in a book that they distributed around the world. (C.A. App. 450.)

testified that the *Weekly Wires* would not be useful to the Russians.

The jury found Morison guilty on all four counts, and the district judge sentenced him to two years imprisonment on each count, each sentence to run concurrently.[3]

D. *The Court of Appeals Opinion*

Although the court of appeals unanimously affirmed Morison's conviction, each member of the panel wrote a separate opinion. Writing for the majority, Judge Russell found that the language of subsections 793(d) and (e) applies to anyone who discloses a document relating to the national defense to one not entitled to receive it and to anyone who retains a document relating to the national defense if he is not authorized to have it. The court further noted that another section of the Espionage Act prohibits disclosure of documents relating to the national defense to agents of foreign governments. 18 U.S.C. § 794(a). From this observation, the court concluded that Congress must have intended subsection 794(a) to cover disclosures to spies and subsection 793(d) to cover disclosures to other individuals.[4]

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[3] Shortly after Morison's arrest, the district court freed him on bond, and the court continued this condition of release pending appeal. After the court of appeals issued its decision, the district judge indicated that he would require Morison to report to prison. Following unsuccessful applications to the court of appeals and this Court for release pending disposition of this petition, Morison entered the federal prison in Danbury, Connecticut on June 15, 1988.

[4] Subsection 794(a) carries a punishment of death or life imprisonment and requires the government to prove that the defendant acted "with intent or reason to believe that [the document] is to be used to the injury of the United States or to the advantage of a foreign power." Subsection 793(d) does not contain this culpability requirement and carries a maximum sentence of ten years imprisonment. Accordingly, the distinction between the two statutes is not that 794(a) applies to disclosures to foreign agents while 793(d) applies to disclosures to the press, but rather is in the degree of culpability of one who discloses national defense documents to foreign agents.

Although the majority found it unnecessary and inappropriate to resort to the legislative history because of the supposed clarity of the statutory language, it nonetheless purported to review the history. On the basis of a cursory examination that overlooked virtually all of the relevant material, the court concluded that subsections 793(d) and (e) were not limited to espionage. It also rationalized the fact that this is only the second prosecution for disclosures to the press by noting that "[v]iolations under the Act are not easily established" and that "any prosecution under the Act will in every case pose difficult problems of balancing the need for prosecution and the possible damage that a public trial will require by way of disclosure of vital national interest secrets in a public trial." (App. 18a.)[5] Like the district court, the majority opinion rejected Morison's vagueness and overbreadth arguments on the basis of its *Dedeyan* decision. (App. 25a-30a.)

In sustaining the theft convictions, the court stated that Morison's conduct "would seem to represent a textbook application of the crime set forth in section 641." (App. 39a.) The court further observed that "[t]his case does not involve copying; this case involves the actual theft and deprivation of the government of its own tangible property." While literally true, this statement seriously mischaracterizes the facts. The portions of the Weekly Wires found in Morison's apartment were xeroxed excerpts of office copies, and the photographs he sent to Jane's were prints made from the originals. But even more significantly, the court failed to appreciate that the government had established that the photographs and Weekly Wires were worth more than $100 only by ref-

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[5] The court did not address the fact that, although these observations apply with at least equal, if not greater, force to cases of espionage, the government regularly brings such prosecutions, even though leaks appear to occur with greater frequency than acts of espionage.

erence to the value of the information they contained rather than their value as tangible things. Accordingly, the court did not respond to Morison's contention that, because section 641 applies only to "things," the value of the photographs and Weekly Wire excerpts should be measured by their worth as tangible property and not by the value of any information they may contain.

Although Judge Russell had written that "we do not perceive any First Amendment rights to be implicated here" (App. 20a), Judge Wilkinson recognized in his concurring opinion that this case involves significant First Amendment interests because "[c]riminal restraints on the disclosure of information threaten the ability of the press to scrutinize and report on government activity." (App. 47a.) He also agreed that whatever Morison's motives may have been for sending the photographs to *Jane's Defence Weekly*, "the undeniable effect of the disclosure was to enhance public knowledge and interest in the projection of Soviet sea power such as that revealed in the satellite photos." (App. 48a.) Judge Wilkinson also noted that this case involves significant interests in protecting the government's intelligence gathering sources. Thus, in his view, the case requires a balancing of the competing interests in secrecy and disclosure.

Since these issues involve the national security, Judge Wilkinson wrote, courts should be deferential to the judgments of the Congress and the executive branch. Applying this deferential balancing, he concluded that criminalization of disclosures of classified information to the press by a government employee is not an unreasonable intrusion on First Amendment interests. However, like Judge Russell, Judge Wilkinson did not address Morison's contention that Congress did not intend subsections 793(d) and (e) and section 641 to apply to leaks, but instead assumed that Congress had intended the statutes to reach Morison's conduct.

Judge Phillips concurred in Judge Russell's opinion with a reservation over "suggestions that as applied to conduct of the type charged to Morison, the Espionage statutes simply do not implicate any first amendment right." (App. 58a.) On that score, Judge Phillips agreed with "Judge Wilkinson's differing view that the First Amendment issues raised by Morison are real and substantial," and concurred in Judge Wilkinson's opinion dealing with these issues. (*Id.*) Judge Phillips further wrote that "[i]f one thing is clear, it is that the Espionage Act statutes as now broadly drawn are unwieldy and imprecise instruments for prosecuting government 'leakers' to the press as opposed to government 'moles' in the service of other countries." (*Id.*)

Judge Phillips agreed with Morison that the key term "relating to the national defense," was, on its face, both vague and overbroad. Consequently, he wrote, subsections 793(d) and (e) "can only be constitutionally applied to convict press leakers (acting for whatever purposes) by limiting jury instructions which sufficiently flesh out" that term. (*Id.*) The question of whether the limiting construction used at Morison's trial adequately remedied the statute's "facial vice" was "a close one" for Judge Phillips. (*Id.*) Indeed, he stated that "were we writing on a clean slate, I might have grave doubts about the sufficiency of the limiting instruction used in Morison's trial." (App. 59a.) In his view, "[t]he requirement that information relating to the national defense merely have some 'potential' for damage or usefulness still sweeps extremely broadly[,] [and] [o]ne may wonder whether any information shown to be related somehow to national defense could fail to have at least some such 'potential.'" (*Id.*) However, since this instruction had been approved in prior Fourth Circuit decisions dealing with classic espionage, Judge Phillips was constrained to concur in the use of the instruction in this case. (*Id.*)

REASONS FOR GRANTING THE WRIT

A. *Introduction and Summary*

This case presents the question of whether Congress intended the general espionage laws and the theft of government property statute to apply to leaks of government documents relating to the national defense and to the retention of such documents in connection with providing information to the press. Beyond its importance to federal employees, the question is of vital concern to the public because, as Judges Wilkinson and Phillips recognized, application of the espionage and theft statutes to disclosures to the press will diminish the amount of information that the press can report to the public about important national security matters. If these statutes are applied to leaks, they will not only deter government employees from disclosing information to the press but also deter the press from receiving and publishing such information because the statutes under which Morison was convicted can be applied to the recipient as well as the provider of government documents.[6] The importance of the case is underlined by the fact that virtually all of the nation's major news organizations appeared in the court of appeals as *amici curiae* (App. 1a) to express their dismay over the application of these statutes to Morison's conduct. Reasonable people can and do differ over whether an anti-leak statute is good or bad policy, but no one can seriously dispute that the heretofore unresolved question of whether current law supplies such a statute is an important one.

In addition to the impact that the decision below will have on the availability of information to the press and public, this case also presents an even deeper question

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[6] Subsection 793(e), which was the basis of the conviction for retaining copies of the Weekly Wire excerpts, specifically applies to a person who is in unauthorized possession of documents relating to the national defense, and section 641 specifically applies to one who receives government property.

concerning the proper role of the courts in interpreting criminal statutes, especially where the interpretation has serious consequences for public knowledge and debate on important issues. Morison does not contend that the First Amendment disables Congress from enacting an appropriately drafted statute making it a crime for government officials to disclose sensitive information. However, given the First Amendment values at stake, he contends that unless it is clear that Congress intended subsections 793(d) and (e) and section 641 to apply to the conduct in which he engaged, it is improper for courts to expand these statutes to accomplish a result that Congress did not clearly legislate.

It is a fundamental principle of due process, separation of powers, and the canons of statutory construction that courts will not extend any criminal statute to conduct when it is uncertain whether the legislature intended to reach that conduct. *McNally* v. *United States*, 107 S.Ct. 2875, 2881 (1987); *Dowling* v. *United States*, 473 U.S. 207, 213-14 (1985). When, as here, the statute affects interests protected by the First Amendment, this rule has special force and the legislative intent must be especially clear. *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966). *See Kent* v. *Dulles*, 357 U.S. 116, 129-30 (1958). Judge Harlan explained this point well when he wrote that government cannot criminalize conduct that is within the range of First Amendment protection by means of a "general and all-inclusive . . . prohibition." *Garner* v. *Louisiana*, 368 U.S. 157, 202 (1961) (concurring opinion). Instead, the legislature must enact a statute that is "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." *Id.* (*quoting Cantwell* v. *Connecticut*, 310 U.S. 296, 311 (1940)). This limitation is not "because control of such activity is beyond the power of the State, but because sound constitutional principles demand of the state legislature that it

focus on the nature of the otherwise 'protected' conduct it is prohibiting, and that it then make a legislative judgment as to whether that conduct presents so clear and present a danger to the welfare of the community that it may legitimately be criminally proscribed." *Id.* at 203.

As we demonstrate below, Congress has not made that judgment with respect to leaks to the press. Whether this nation should have a general anti-leak statute is a difficult policy question, but there is no question that the decision is for Congress to make rather than for the courts through expansion of existing statutes that were intended for other purposes. "If there is a gap in the law, the right and the duty, if any, to fill it do not devolve upon the courts." *United States* v. *Laub*, 385 U.S. 475, 486 (1967).

B. *Subsections 793(d) and (e)*

1. In the leading study of the espionage statutes, two prominent scholars concluded on the basis of an exhaustive review of the legislative history that "Congress undoubtedly did not understand 793(d) and (e)" to reach "[t]he source who leaks defense information to the press." Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 1000 (1973).[7] Throughout the debates that preceded en-

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[7] Contrary to the opinion of the court of appeals (App. 11a-12a), it is appropriate to examine the legislative history of subsections 793(d) and (e) for several reasons. Most importantly, the First Amendment implications of applying these statutes to disclosures to the press require the Court to examine carefully whether Congress actually intended such a result. In addition, whenever a statute is unclear, resort to the legislative history is proper, *Allen* v. *State Board of Elections*, 393 U.S. 544, 570 (1969), and, as Justice Harlan recognized, the Espionage Act of 1917 is "a singularly opaque statute." *New York Times Co.* v. *United States*, 403 U.S. 713, 754 (1971) (dissenting opinion). Indeed, even when the language of a statute is clear, the legislative history may appropriately be con-

actment of the statute in 1917, the bill's supporters repeatedly stated that it was designed to stop spies and that other Americans had nothing to fear. Senator Pittman, for example, stated:

> The object of this act is to punish spies. That is the object of the act. The object of the act is to punish a man guilty of a crime, and that crime consists in spying on his government.

54 Cong. Rec. 3599 (1917).[8]

In addition, Congress rejected various versions of a provision that would have specifically authorized prosecution of the press and its sources for publication of information designated by Presidential regulation as relating to the national defense. *See* Edgar & Schmidt, *supra*, 73 Colum. L. Rev. at 946-65, 1013-14. Although proponents of this restriction on publication argued that criticism of government policy would be protected, the successful opponents argued that criticism was impossible without disclosures of facts, which in many cases could come only from government officials. The debate focused on two examples of actual press stories that had been based on disclosures by government officials, and Congress refused to criminalize the publication of such stories.[9] Since the

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sulted to determine whether there is a clearly expressed legislative intention contrary to that language. *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, 107 S.Ct. 1207, 1213 n.12 (1987); *United States* v. *James*, 106 S.Ct. 3116, 3122 (1986). Moreover, the government's proposal that the district court employ a limiting instruction in defining for the jury the term "relating to the national defense" was a candid admission that the statute cannot be read literally.

[8] Similar statements are found at 54 Cong. Rec. 3592-93 (Sen. Lee); 3600 (Sen. Overman) (1917); 55 Cong. Rec. 1590 (Rep. Webb); 1695 (Rep. Morgan); 1700 (Rep. LaGuardia); 1752 (Rep. Osborne); 1768-69 (Rep. Kelly); 2095 (Sen. Husting) (1917).

[9] One was a story in the *London Times* that British troops were being killed because their own ammunition was defective. 54 Cong. Rec. 3607 (1917); 55 Cong. Rec. 780-81, 2121 (1917). The other was

legislators realized that these stories were based on information from government officials, 55 Cong. Rec. 2115, 2122 (1917), it is apparent that Congress also refused to criminalize disclosures by officials who leak to the press.

When Congress amended the 1917 espionage statute in 1950, it again demonstrated that it intended criminal penalties to reach only those engaged in espionage. As in 1917, some Members questioned whether the statute would stifle press reporting of defense matters. *See, e.g.*, 95 Cong. Rec. 9747 (1949). In order to allay these concerns, Senator McCarran, the chief sponsor of the amendment, asked Attorney General Tom Clark for his opinion. *Id.* Clark replied that "nobody other than a spy, saboteur, or other person who would weaken the internal security of the Nation need have any fear of prosecution under either existing law or the provisions of this bill." *Id.* at 9749.

2. In addition to the specific legislative history of subsections 793(d) and (e), there are other factors that should cause courts to refrain from expanding these statutes to reach disclosures to the press. Despite periodic requests from the executive branch over the past four decades for a broad anti-leak statute, "Congress has repeatedly refused to enact a statute which would make criminal the mere unauthorized disclosure of classified information." *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 927 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144 (1982) (separate opinion of Winter, J.).[10] Instead, Congress has enacted several statutes aimed at disclosure of specific types of particularly sensitive information—classi-

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a story revealing the Navy's plan to spread a net across New York harbor to catch submarines. 55 Cong. Rec. 2073, 2111-12 (1917).

[10] *See National Security Secrets and the Administration of Justice: Report of the Senate Select Comm. on Intelligence*, 95th Cong., 2d Sess. 17-19 (1978) (summarizing past legislative initiatives).

fied communications intelligence, 18 U.S.C. § 798; atomic energy information, 42 U.S.C. §§ 2274, 2277; and the identities of covert intelligence agents, 50 U.S.C. § 601 —and one statute that makes it a crime for a government employee to disclose classified information to a foreign agent or a member of a communist organization. 50 U.S.C. § 783(b). If subsections 793(d) and (e) reached the general practice of leaking, none of these additional statutes would have been necessary, nor would the executive branch have repeatedly sought an anti-leak statute.

Furthermore, government officials charged with protecting the national security have frequently stated that existing statutes do not reach press leaks. For example, William Colby, the former Director of Central Intelligence, has testified that Congress "has drawn a line between espionage for a foreign power and simple disclosure of our foreign policy and defense secrets, and decided that the latter problems are an acceptable cost of the kind of society we prefer." *Espionage Laws and Leaks: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 96th Cong., 1st Sess. 146 (1979). *See id.* at 22 (statement of CIA's General Counsel).

Several executive branch studies have concluded that existing criminal statutes do not clearly apply to disclosures to the press. For example, in 1982, an interdepartmental task force found that there is a generally accepted understanding that the espionage and theft statutes do not apply to press leaks.[11] In analyzing the legal framework relevant to leaks, this report stated that "there is no single statute that makes it a crime as such for a

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[11] *Report of the Interdepartmental Group on Unauthorized Disclosure of Classified Information* (March 31, 1982), *reprinted in Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st and 2d Sess. 166-180 (1984).

government employee to disclose classified information without authorization." *Id.* at 167. The report asserted that subsections 793(d) and (e) might be used in leak cases, but acknowledged that "[t]hese provisions have not been used in the past to prosecute unauthorized disclosures of classified information, and their application to such cases is not entirely clear." *Id.* at 172.

In 1985, while this prosecution was underway, the CIA informed the Office of Management and Budget that "[w]ith the narrow exceptions of unauthorized disclosures of atomic energy Restricted Data, communications intelligence and cryptography information, and the identities of covert agents, willful unauthorized disclosures of classified information by those entrusted with it by the government are not *per se* offenses under federal criminal statutes." (Brief of Appellant, Addendum at 7.) *See* Edgar & Schmidt, *supra*, 73 Colum. L. Rev. at 1055 (citing earlier government studies reaching the same conclusion).

In light of the extensive evidence that Congress did not intend subsections 793(d) and (e) to apply to leaks and the important consequences for the public of the court of appeals' contrary holding, this Court should grant review.

C. *Section 641*

Morison's conviction presents two important questions concerning the reach of the section 641: first, is it proper to apply this general theft statute to classified documents in view of the fact that Congress has specifically criminalized the disclosure of only certain categories of such documents and has declined to enact a general anti-leak statute; and second—a question that divides the circuits—does section 641, which proscribes the taking of "things," apply to the taking of intangible information. Since the consequences of applying section 641 to leaks are the same as applying subsections 793(d) and (e) to such conduct, Morison's conviction under the theft statute presents

questions just as important as those presented by his conviction under the espionage statutes. Moreover, the grounds for doubting that Congress intended section 641 to proscribe press leaks are even greater than the grounds for doubting that Congress intended the espionage statutes to reach that conduct.

1. While the use of subsections 793(d) and (e) to prosecute leaks is dubious at best, those statutes at least deal with the general subject of the protection of national defense information. But felony convictions for disclosing government information are wholly outside the intended reach of section 641. The legislative history of subsections 793(d) and (e) demonstrates not only that Congress did not intend the espionage statutes to apply to disclosures to the press, but also that Congress did not believe that the theft statute, which in various forms had been on the books since 1875, applies to such disclosures. Professors Edgar and Schmidt, in commenting on the district court decision in this case, concluded in light of their earlier research on the espionage statutes that extension of section 641 to disclosures to the press of classified information "flatly contravenes congressional intent." Edgar & Schmidt, *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 Harv. C.R.-C.L. L. Rev. 349, 402 (1986). If in fact section 641 had all the while been an anti-leak statute, Congress' concern, both in 1917 and 1950, not to criminalize disclosures to the press was a misplaced waste of time. Indeed, if Congress intended section 641 to have the sweep ascribed to it by the courts below, there would be no need for the statutes making it a crime to disclose crop reports, 18 U.S.C. § 1902, trade secrets, 18 U.S.C. § 1905, information obtained through electronic surveillance, 18 U.S.C. § 2511(c), or tax returns, 26 U.S.C. § 7213.

In his separate opinion in *Truong*, Judge Winter concluded that it is "apparent that § 641 cannot, consistent

with the congressional framework of criminal statutes explicitly directed at classified information, be applied to punish . . . the unauthorized disclosure of classified information." 629 F.2d at 926.[12] He noted that "Congress has legislated frequently and with precision with regard to the unauthorized disclosure of classified information, and it has chosen to punish only certain categories of disclosures and defendants." *Id.* Thus, "[i]f § 641 were extended to penalize the unauthorized disclosure of classified information, it would greatly alter this meticulously woven fabric of criminal sanctions . . . [and] sweep aside many of the limitations Congress has placed upon the imposition of criminal sanctions for the disclosure of classified information." *Id.* at 926-27. Judge Winter therefore concluded that "[b]ecause § 641 would disturb the structure of criminal prohibitions Congress has erected to prevent some, and only some, disclosures of classified information, the general anti-theft statute should not be stretched to penalize the unauthorized disclosure of classified information." *Id.* at 927 (footnote omitted).

Stated another way, there is even less basis for believing that Congress intended that the general federal statute prohibiting the theft of government property was ever intended to be used to punish those who leak government documents than there is for believing that the espionage laws apply to such conduct. Because of the potential that such a sweeping interpretation has for chilling dissent, dampening a free press, and limiting the amount of information available to the public, the Court should grant review.

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[12] Truong and a co-defendant were convicted under espionage counts as well as section 641. Concluding that the concurrent sentence rule made consideration of the section 641 conviction unnecessary, the two other panel members did not join Judge Winter's discussion of section 641. *Id.* at 922. Judge Winter did not consider Morison's suggestion for rehearing *en banc* because he had earlier recused himself from this case.

2. In addition to the question whether section 641 applies to classified information, there is another question, over which the circuits are divided, whether the statute applies to intangible property of any sort. This issue is clearly presented in this case because the government's proof that the photographs Morison sent to Jane's and the xerox copies of the Weekly Wires he kept at his apartment were worth more than $100—the statute's dividing line between a misdemeanor and a felony—rested on the value of the information contained in the photographs and Weekly Wires rather than on their value as tangible property. To the extent Morison was convicted of a felony under section 641, it was because he converted intangible information rather than tangible property. However, under a correct reading of the statute, the government should have been required to prove that the tangible constituents of the photographs and Weekly Wires—the paper and the printing processes that produced them—were worth more than $100 in order to convict Morison of a felony. The government, however, made no such showing. If indeed section 641 applies to classified documents, Morison's taking of the prints of the photographs and the xeroxed excerpts of the Weekly Wires may have been a misdemeanor, but it was not a felony.

In *Chappell* v. *United States*, 270 F.2d 274, 276-78 (9th Cir. 1959), the court held that section 641 applies only to the theft or conversion of tangible property and not to intangibles. In that case an Air Force sergeant directed one of his subordinates to paint private apartments owned by the sergeant on the Air Force's time. On the basis of a thorough examination of the common law history of the crimes incorporated in section 641, the court concluded that none of them apply to the appropriation of intangible property.

The Ninth Circuit has recently reaffirmed *Chappell* in *United States* v. *Tobias*, 836 F.2d 449 (9th Cir.), *cert.*

denied, 108 S.Ct. 1299 (1988). In that case, a Navy radioman was charged with selling cryptographic cards that are used in the operation of shipboard coding machines. In adhering to the holding in *Chappell* that section 641 applies only to tangible goods, the *Tobias* court noted that "[t]his interpretation has the advantage of avoiding the first amendment problems which might be caused by applying the terms of section 641 to intangible goods—like classified information." 836 F.2d at 451. Nonetheless, the court affirmed Tobias' conviction because the cryptographic cards were a device for encoding and decoding classified messages and did not contain the messages themselves. *Id.* at 452.

Other courts have differed with the Ninth Circuit and held that section 641 does apply to intangible matters, including government information divorced from the documents in which they appear. *United States* v. *Jeter*, 775 F.2d 670, 679-82 (6th Cir. 1985), *cert. denied*, 475 U.S. 1142 (1986); *United States* v. *Girard*, 601 F.2d 69, 70-72 (2d Cir.), *cert. denied*, 444 U.S. 871 (1979). This conflict between the circuits merits this Court's attention, particularly in view of the important First Amendment implications of any holding that conversion of government information, whether classified or not, falls within the ambit of section 641.

D. *Vagueness and Overbreadth*

If the Court concludes that subsections 793(d) and (e) and section 641 apply to petitioner's conduct, then it must face the question of whether, as construed by the courts below, they are unconstitutionally vague or overbroad. As leading scholars have noted, statutes that make it a felony to disclose government documents in any way "relating to the national defense" raise significant constitutional issues. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case*, 26 Stan. L. Rev. 311, 324-27 (1974); Edgar & Schmidt, *The Espionage Statutes and Publication of De-*

fense Information, *supra*, 73 Colum. L. Rev. at 1000. Similarly, if section 641 applies to the unauthorized disclosure of any government document, it too is substantially overbroad. Nimmer, *supra*, 26 Stan. L. Rev. at 322. And, if commission of a felony under section 641 depends on the valuation of intangible information, the statute is vague as well.

The courts below answered Morison's vagueness arguments, in part, by observing that since the photographs and Weekly Wires were classified, Morison was on notice that he should not have taken them. But as we have seen, Congress has, with limited exceptions not applicable here, refused to enforce the classification system with criminal penalties. Accordingly, classification is not a legitimate means to cure the vagueness of either subsections 793(d) and (e) or section 641. Edgar & Schmidt, *supra*, 73 Colum. L. Rev. at 1057.

The courts below also responded to Morison's constitutional challenge to subsections 793(d) and (e) by relying on the *Dedeyan* construction of the term "relating to the national defense." In urging the courts to use this limiting construction, the government conceded that this term must be narrowed from its facial reach. However, the concept of "potential" damage or usefulness merely substitutes one vague and overbroad term for another. As Judge Phillips recognized in voicing "grave doubts about the sufficiency" of this instruction, it "still sweeps extremely broadly," and under this standard the government will always be able to demonstrate "at least some such 'potential'" with respect to any document that relates to the national defense. (App. 59a.) Indeed, in view of the extensive prior compromises of the capabilities of the KH-11 satellite and the fact that the Weekly Wires never left Morison's apartment, the question of whether his conduct caused any realistically foreseeable or probable damage was not free of reasonable doubt. However, as instructed under the undefined and open-ended concept

of "potential" damage, the jury was virtually required to convict. These interpretive problems presented by subsections 793(d) and (e) and section 641 are important issues that merit this Court's attention.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 28, 1988